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THE RIGHT TO A FAIR TRIAL IN CHINA

Daphne Huang

Abstract: The right to a fair trial is a growing international standard that protects defendant rights before, during, and after trial. Despite significant changes to China's Criminal Procedure Law and Criminal Law, China presently fails to comply with the standard. China's history of human rights abuses and the obstacles to compliance make enforcement of the right seem an insurmountable task. However, the trends of democratization and economic globalization, combined with optimistic reports of political reform in China provide hope that compliance with the right will eventually be achieved.

I. INTRODUCTION

The right to a fair trial is gaining acceptance as an international human rights standard.¹ In 1990, the United Nations formed the Sub-Commission on the Prevention of Discrimination and Protection of Minorities ("Sub-Commission") to study not only the right to a fair trial, but also to develop a body of principles defining the right.² The Sub-Commission issued the Draft Body of Principles on the Right to a Fair Trial and Remedy ("Draft Body of Principles") in 1994.³ The elements include rights before trial, such as the right to be free from arbitrary arrest and detention, as well as rights during trial, such as independent and impartial tribunals and adequate defense counsel.⁴ The right to appeal and the right to an effective remedy after trial are also included.⁵

Throughout history, China has de-emphasized formal written laws and judicial procedures⁶ essential for compliance with the fair trial right. But recently, many amendments were made to the Chinese Criminal Procedure

¹ *China: Amnesty International Meets with Chinese Officials*, Amnesty International, June 13, 1997 <<http://www.amnesty.org>> AI Index: ASA 17/33/97; LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996) [hereinafter OPENING TO REFORM].

² *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 42nd Sess., Agenda Item 10 (d), U.N. Doc. E/CN.4/Sub.2/1990/34 (1990).

³ *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 46th Sess., Annex 2, Prov. Agenda Item 10(d), at 63, U.N. Doc. E/CN.4/Sub.2/1994/24 (1994) [hereinafter *Draft Body of Principles*].

⁴ See *infra* Section II.

⁵ See *infra* Section II.

⁶ Ronald J. Troyer, *Chinese Thinking about Crime and Social Control*, in *SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA* 45, 51-52 (Ronald J. Troyer et al. eds., 1989).

Law⁷ and Criminal Law⁸ which ostensibly bring China closer to compliance with the right to a fair trial.⁹ Despite these changes, many elements of the right are still absent from China's written laws, and enforcement of the amendments is questionable.

To understand why full compliance with the right to a fair trial is such a daunting task, one must consider the obstacles that China faces. First, China culturally and historically emphasizes the collective over the individual.¹⁰ This makes the fair trial right, which is highly protective of the individual,¹¹ unnatural and undesirable to Chinese leaders. Also, providing the fair trial right requires an independent and impartial judiciary, which China currently lacks. China's historical de-emphasis of the judiciary¹² will make it very difficult to develop a legal infrastructure that corrects these deficiencies.

Given the obstacles, China's compliance with the right to a fair trial seems an insurmountable task. However, one should not declare it an impossibility. China's future is difficult to predict.¹³ As this Comment will briefly discuss, China has experienced phenomenal changes in the past half century.¹⁴ Also, recent events in China have kept the world in rapt attention.¹⁵ According to China's leaders, economic reform will be joined by political reform.¹⁶ Further shifts towards compliance with the fair trial right would not be unfathomable nor unprecedented.

Democracy is not, by definition, a necessary step to achieving compliance with the fair trial right. However, a system of government with elements of democracy would provide those core rights¹⁷ necessary for compliance with the right to a fair trial as defined in Section II of this Comment. Many believe that democracy for China is inevitable, given the trend of economic globalization and China's role in the world economy.¹⁸ Thus, although all the needed changes may

⁷ Zhonghua Renmin Gongheguo Xingshi Susungfa [The People's Republic of China's Criminal Procedure Law] (1979) (amended 1996) *translated in* World News Connection (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>> [hereinafter CPL].

⁸ Zhonghua Renmin Gongheguo Xingfa [China's Criminal Law] (1979) (amended 1997), *translated in* World News Connection (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>> [hereinafter CL].

⁹ See *infra* Section III (B).

¹⁰ Troyer, *supra* note 6, at 51-52.

¹¹ The right as defined *infra* Section II (B) includes the right to be free from coerced confessions, the presumption of innocence, the right to an independent and impartial tribunal, and the right to appeal.

¹² Troyer, *supra* note 6, at 51-2.

¹³ See *infra* note 157 and accompanying text.

¹⁴ See *infra* Section IV(B)(1).

¹⁵ Orville Schell, *What to Think About China*, N.Y. TIMES, June 29, 1997, at 14.

¹⁶ See *infra* note 181 and accompanying text.

¹⁷ See *infra* note 197 and accompanying text.

¹⁸ See *infra* Section IV(B)(3).

not happen at once, there is hope for compliance with the right to a fair trial in China's future.

This Comment will first discuss the viability of international standards, and then set forth elements for the right to a fair trial, including rights before, during, and after trial. Next, China's current status regarding compliance with the right will be discussed in light of the amendments to China's Criminal Procedure Law and Criminal Law. This Comment will then look to the future of the fair trial right in China, examining the obstacles to compliance as well as the reasons for hope.

II. DEFINING THE INTERNATIONALLY APPLICABLE RIGHT TO A FAIR TRIAL

The right to a fair trial is not itself on a list of customary international standards.¹⁹ However, several elements of the right are included on the list, such as prohibitions on "torture or other cruel, inhuman or degrading treatment or punishment," and "prolonged arbitrary detention."²⁰ In response to the growing international acknowledgment of a fair trial right, the U.N. established a Sub-Commission to research the right and develop the Draft Body of Principles on the Right to a Fair Trial and Remedy.²¹ This section will provide some background on the history and viability of international human rights standards, and define the right to a fair trial based on the definition drafted by the U.N. Sub-Commission.

¹⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, SECTION 702 (1987). See also Lawrence M. Friedman, "The United States-China Act of 1991" and Customary International Law, 13 B.C. THIRD WORLD L.J. 257, 263-64 (1993).

²⁰ Friedman, *supra* note 19.

²¹ Rapporteurs Stanislav Chernichenko and William Treat were appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to report on existing international standards regarding the right to a fair trial, and to recommend which provisions to the right should be non-derogable. The rapporteurs submitted five reports plus addenda pursuant to the Commission on Human Rights' provisional agenda, entitled "The Administration of Justice and the Human Rights of Detainees." Each report identified existing treaties and other instruments providing the right to a fair trial. *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 43rd Sess., Agenda Item 10 (d) at 2, U.N. Doc. E/CN.4/Sub.2/1991/29 (1991). The goal of the study was ultimately to recommend provisions that would strengthen the right to a fair trial. Thus, the Draft Body of Principles attempts to synthesize the elements of the right to a fair trial that are found to be the *most protective* of detainees' rights. The reports for the study indicate that the standards of which the Draft Body of Principles is comprised are the policies of the responding nations, and therefore the international norm. The reports also reveal that the standards are often violated *despite* national policies that mandate them. Thus, the viability of the right arises from its acceptance in national policies around the world; the fact that some states may be violating it in practice does not invalidate the right to a fair trial as an international standard. See *infra* note 23.

A. *The Development and Viability of International Standards*

Two of the United Nations' stated purposes are to maintain international peace and security, and to promote and encourage respect for human rights.²² Since its formation in 1945, the United Nations has adopted many instruments with the objective of insuring international human rights standards, including rights before, during, and after trial.²³ Compliance with the international standards named in these documents is not secured by threat of military action.²⁴ Instead, the United Nations Economic and Social Council ("ECOSOC") and the Human Rights Commission have established a system of procedures to investigate the activities of suspected violator nations.²⁵ As part of this process, U.N. member nations compel compliance by applying political and social pressures to violating countries. Economic pressures have also been used by some nations, but the lack of unanimity in the international community regarding the appropriateness of such measures diminishes their effectiveness.²⁶

²² U.N. CHARTER art. 1, para. 1, 3.

²³ Elements of the right to a fair trial can be found in both the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter Declaration] and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter Covenant]. However, the Declaration, adopted in 1948, lacks monitoring and enforcement provisions. INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 8 (Frank Newman & David Weissbrodt eds., 2d ed. 1996). The Covenant, entered into force in 1976 as part of the International Bill of Human Rights, is a treaty with prescriptive force. *Id.* According to the Vienna Convention on the Law of Treaties, "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty" when it ratifies that treaty, indicating acceptance or approval. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.S. No. 58 art. 18 (1980). A State that has not ratified a treaty is not obligated to abide by the treaty's provisions.

Where there are no treaties to which a nation can be bound, customary international law can be used as an enforcement mechanism. Friedman, *supra* note 19, at 260. The International Court of Justice set forth no clear time period after which a norm is considered customary international law. *Id.* at 262. But a consistent pattern of practice pursued out of "a sense of legal obligation" is required before such status can be attained. *Id.* The Restatement (Third) of the Foreign Relations Law of the United States did not include the right to a fair trial on its list of customary international norms. *Id.* at 263.

²⁴ The U.N. Commission on Human Rights determined in 1947 that it had "no power to take any action" with respect to any complaints of human rights violations. INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS, *supra* note 23, at 182.

²⁵ The Economic and Social Council ("ECOSOC") of the United Nations passed resolutions 728F, 1235, and 1503, and the Human Rights Commission established theme-oriented procedures for responding to complaints of Human Rights violations. INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS, *supra* note 23, Ch. 5. Also, the U.N. has been working towards the formation of an International Criminal Court that will try individuals for international war crimes, genocide, and other crimes against humanity. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

²⁶ For example, the United States-China Act of 1991 imposed Human Rights requirements in order to continue China's Most-Favored-Nation ("MFN") status. Friedman, *supra* note 19, at 258. This attempt to use economic factors to influence China's Human Rights policies exemplifies China's

The viability of international standards for human rights has been much debated between cultural relativists and universalists.²⁷ Cultural relativists argue that there can be no international standard, that each nation must be allowed to adopt standards for the right to a trial that are fair in the context of its specific culture.²⁸ Universalists argue that there is a standard below which no nation can fall without violating fundamental human rights.²⁹ Favoring the cultural relativist standpoint, China has adopted a defense of absolute sovereignty in the face of international criticism for its human rights record.³⁰ But, China's participation in human rights monitoring of Chile, Israel, and Southern Rhodesia reveals that its absolute sovereignty argument is a double standard.³¹ Indeed, China's membership in the United Nations and ratification of the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment³² indicate its willingness to accept international human rights standards.³³

B. *The Elements of the Right to a Fair Trial*

The list of elements for the right to a fair trial provided in this Comment is not exhaustive, but represents the key standards from the U.N. Sub-Commission's Draft Body of Principles that together would provide the right to a fair trial.³⁴ The elements or standards are divided into rights before trial, rights during trial, and rights after trial.

resistance to such pressures. In response to the United States-China Act, the Chinese Foreign Ministry reiterated its zero-tolerance for "interference in China's internal affairs." Lena H. Sun, *Chinese Condemn Senate Vote*, WASH. POST, July 25, 1991, at A31.

²⁷ Gautam Rana, . . . *And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. TRANSNAT'L L. 349, 364 (1997); David E. Christensen, *Breaking the Deadlock: Toward a Socialist-Confucianist Concept of Human Rights for China*, 13 MICH. J. INT'L L. 469 (1992).

²⁸ Christensen, *supra* note 27, at 470.

²⁹ *Id.*

³⁰ *Id.* at 482.

³¹ *Id.* at 483 n.117.

³² Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Annex, Supp. No.51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture]. China signed the Convention Against Torture on December 12, 1986, and ratified it on October 4, 1988. *Multilateral Treaties Deposited with the Secretary-General* 188, U.N. Doc. ST/LEG/SER/E/15 (1996).

³³ Accordingly, this comment will assume that by participating in international human rights discourse, China has acknowledged the validity of enforceable international standards.

³⁴ *Draft Body of Principles*, *supra* note 3. Sources used to derive the Draft Body of Principles were the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 46th Sess., Prov. Agenda Item 10(d), at 11-13, U.N. Doc. E/CN.4/Sub.2/1994/24 (1994). The Sub-Commission also looked to laws and constitutions in nations all over the world, comments by the Human

1. *Rights Before Trial*

For a fair result, there must be rights before trial. Everyone must have the right to be free from arbitrary arrest and detention.³⁵ The state must have probable cause in order to arrest and charge an individual for a crime,³⁶ and no one can be found guilty for an offense which did not constitute a crime at the time of the accused's act or omission.³⁷ Defendants must be free from coerced confessions.³⁸ Where confessions have been obtained during incommunicado detention or are otherwise coerced, they shall not be admissible in evidence at trial.³⁹ Finally, everyone has the right to be brought before a judge⁴⁰ without undue delay.⁴¹

2. *Rights During Trial*

A defendant must also have rights during trial. It is crucial for the defendant to have the right to a presumption of innocence,⁴² whereby the state has the burden of proving guilt.⁴³ Tribunals must be independent from the executive branch⁴⁴ or any parties in a case,⁴⁵ and must be able to perform their duties without being subject to any authority "aside from duly registered appeals after judgment"⁴⁶ To be impartial, tribunals must "decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference"⁴⁷ Hearings must be

Rights Committee, the European Commission and Court of Human Rights, the Inter-American Commission and Court of Human Rights, non-governmental organizations, bar associations, and scholars world-wide in developing its standards for the right to a fair trial. *Id.* at 11-16.

³⁵ *Draft Body of Principles, supra* note 3, at 68.

³⁶ *Id.* at 69.

³⁷ *The Administration of Justice and the Human Rights of Detainees, supra* note 34, at 77.

³⁸ *Id.* at 76.

³⁹ *Id.*

⁴⁰ *Id.* at 69.

⁴¹ *Covenant, supra* note 23, art. 14, § 3(c).

⁴² Because the state must have probable cause to arrest someone, evidence brought to trial tends to favor the prosecution. *Covenant, supra* note 23, art. 9. The presumption of innocence helps to assure that there is an "equality of arms." *Id.* art. 14, § 2. In other words, the defendant is on an equal footing with the State with respect to the burden of proof.

⁴³ *Draft Body of Principles, supra* note 3, at 76.

⁴⁴ *Id.* at 67.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 68.

public,⁴⁸ except that the press and public may be excluded where national security interests are compelling.⁴⁹ Defendants must be entitled to free legal assistance of their own choosing,⁵⁰ beginning "when the accused is first detained or charged."⁵¹ To be adequate, counsel must have sufficient "time and facilities for the preparation of his or her defense."⁵²

3. *Rights After Trial*

Finally, the right to a fair trial must not end once the verdict is rendered, but continue after trial. Everyone convicted of a crime is entitled to appeal the conviction to a higher court.⁵³ Also, no one can be tried or punished for the same offense more than once.⁵⁴ Anyone whose rights or freedoms are violated with respect to the provisions guaranteed under the right to a fair trial must be entitled to an effective remedy.⁵⁵

III. THE CURRENT STATUS OF THE RIGHT TO A FAIR TRIAL IN CHINA

A. *A History of Non-Compliance*

China is notorious for failing to comply with human rights standards, including the rights associated with the right to a fair trial.⁵⁶ In 1991, the International Federation of Human Rights, a non-governmental organization, submitted a communication to the United Nations as part of the study on

⁴⁸ By making trials open to the public, the state can be held accountable to the people at large. Covenant, *supra* note 23, art. 14 § 1.

⁴⁹ *Draft Body of Principles*, *supra* note 3, at 66.

⁵⁰ Covenant, *supra* note 23, art. 14, § 3(d).

⁵¹ *Draft Body of Principles*, *supra* note 3, at 71.

⁵² *Id.* at 72.

⁵³ *Id.* at 78; Covenant, *supra* note 23, art. 14, § 5.

⁵⁴ This is the right to be free from double jeopardy. Covenant, *supra* note 23, art. 14, § 7; *Draft Body of Principles*, *supra* note 3, at 78.

⁵⁵ Covenant, *supra* note 23, art. 2, § 3. In other words, the rights and freedoms guaranteed to an individual must be backed by some mechanism of enforcement.

⁵⁶ An August 26, 1997 Amnesty International Report declared that "trials [in China] are frequently unfair, the process is heavily weighted in favour of the prosecution, defendants have little chance of adequate legal representation or the time to prepare their defense, guilt is often presumed in advance of the trial and the appeals process is severely limited." *China: Death Penalty Breaks New Records*, Amnesty International, Aug. 26, 1997 <<http://www.amnesty.org>> AI Index: ASA 17/39/97. Another article from June 13, 1997, stated that Amnesty International has concerns over areas where Chinese law and practice fall short of international human rights standards, including the right to a fair trial. *China: Amnesty International Meets with Chinese Officials*, *supra* note 1.

"The Administration of Justice and the Human Rights of Detainees."⁵⁷ The communication documented China's practices as "a source of grave concern" regarding the right to a fair trial.⁵⁸ It noted vague definitions in China's penal code, the lack of a presumption of innocence, inadequate right to defense counsel, and the lack of independence of the judiciary.⁵⁹ Amnesty International, long critical of China's human rights abuses, also addressed China's denial of a fair trial in a recent report.⁶⁰ Cited specifically was the lack of a presumption of innocence,⁶¹ known widely in China as "verdict first, trial second."⁶²

B. *Changes in Chinese Laws*

In March 1996, China amended its Criminal Procedure Law ("CPL"),⁶³ and in March 1997, China amended its Criminal Law ("CL").⁶⁴ On their face, the new laws arguably come close to complying with the right to a fair trial as described in this Comment. Regarding the changes to the CL, Vice Chairman of the National People's Congress ("NPC") Standing Committee, Wang Hanbin, stated that China is striving for the creation of "a unified and relatively complete criminal code," intended to improve the criminal law system and safeguard the overall interest of China.⁶⁵ Another source in China explained that the amendments are "intended to protect the legitimate rights and interests of Chinese citizens."⁶⁶ However, the amendments do not hold

⁵⁷ *The Administration of Justice and the Human Rights of Detainees*, U.N. Comm'n on Human Rights, 43rd Sess., Agenda Item 10(d), U.N. Doc. E/CN.4/Sub.2/1991/NGO/19 (1991).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *People's Republic of China, Gross Human Rights Violations Continue*, Amnesty International Country Report, Feb. 1996 <<http://www.amnesty.org>> AI Index: ASA 17/17/96.

⁶¹ *Id.*

⁶² *China, State Secrets: A Pretext for Repression*, Amnesty International Country Report, Mar. 1996 <<http://www.amnesty.org>> AI Index: ASA 17/42/96.

⁶³ CPL, *supra* note 7.

⁶⁴ CL, *supra* note 8. See also Seth Faison, *Chinese Revise Criminal Code, Not Its Essence*, N.Y. TIMES, Mar. 6, 1997 at A1.

⁶⁵ *China to Make Large-Range Amendments to Criminal Law*, Xinhua English Newswire, Dec. 24, 1996, available in 1996 WL 14563161.

⁶⁶ *Commentary: Law Amendments for Better Checks and Balances*, Xinhua News Agency, Mar. 14, 1996, available in LEXIS, Asiapc Library, Xinhua File. The commentary went on to describe the major revisions in the Criminal Law, noting the prevention of bias as a specific goal.

the assurance of enforcement by all or any actors in China's legal system,⁶⁷ and some key elements of the fair trial right are still missing.⁶⁸

1. *Rights Before Trial*

China has taken strides to increase rights before trial. Under the old law, people could be arrested and convicted for acts or omissions that were merely similar to acts or omissions that constituted crimes.⁶⁹ But this practice, known as "crime by analogy," has been abolished by the new CL which declares that no one may be convicted or given punishment for "any act that no explicit stipulation of law deems a crime."⁷⁰ The elimination of "crime by analogy" would seemingly lead to a lower conviction rate. However the amended CL increases the number of articles defining crimes from 192 to 449,⁷¹ thus there are now more acts for which one could receive a conviction.

China has long been criticized by human rights advocates worldwide for the administrative sanction called "shelter and investigation" ("SI") whereby those accused could be detained for long periods without a hearing.⁷² As one legal scholar noted, statements accompanying the new CPL declare that the sanction is formally abolished.⁷³ Prosecutorial and procuratorate⁷⁴ power are further limited by the elimination of "exemption from prosecution" from the CPL.⁷⁵ This procedure allowed prosecutors and members of the procuratorate to declare a guilty verdict without a trial.⁷⁶

⁶⁷ Faison, *supra* note 64.

⁶⁸ OPENING TO REFORM, *supra* note 1; See also Jonathan Hecht, *An Opening to Reform? LAWYERS COMMITTEE FOR HUMAN RIGHTS, Executive Summary*, (visited Sept. 8, 1997) <<http://www.lchr.org/pubs/china/htm>> [hereinafter Executive Summary], summarizing the changes in CPL and CL and China's current status in complying with the right to a fair trial.

⁶⁹ China: NPC Session Studies Amended Criminal Law Draft, BEIJING LIAOWANG, Jan. 27, 1997, available in World News Connection (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>>.

⁷⁰ CL, *supra* note 8 art. 3. See also China: NPC Session Studies Amended Criminal Law Draft, *supra* note 69.

⁷¹ Faison, *supra* note 64.

⁷² LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS 67 (1993) [hereinafter CRIMINAL JUSTICE].

⁷³ Yu Ping, *The Revised Criminal Procedure Law*, CHINA RIGHTS FORUM (Fall 1996) (visited Nov. 8, 1997) <<http://www.igc.apc.org/hric/crf/english/96fall/e4.html>>.

⁷⁴ The People's Procuratorates are essentially the equivalent of the prosecutors offices of the state and federal governments in countries such as the United States, although China's constitution makes their status, "at least in legal theory higher than their counterparts in these countries." ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 124 (1993).

⁷⁵ CPL, *supra* note 7. See also Yu Ping, *supra* note 73.

⁷⁶ Yu Ping, *supra* note 73.

Although these bold moves seem to promote the right to be free from arbitrary arrest or detention, reality may prove otherwise. The supposed changes in the CPL regarding SI arguably effect no change at all.⁷⁷ According to another legal scholar, SI was not explicitly abolished by the CPL, but because amendments to the CPL are so inconsistent with it, the practice is held to be "abolished by implication."⁷⁸ Also, the new CPL makes no mention of abolishing the administrative sanction known as "re-education through labor."⁷⁹ Long a source of infamy for China, this sanction allows police to detain accused criminals in "re-education labor camps" for up to four years.⁸⁰ Therefore, although the changes in the CPL demonstrate a positive step towards providing hearings, China is not in strict compliance with the right to be free from arbitrary arrest and detention.

Article 43 of the CPL prohibits "the use of torture to coerce statements and the gathering of evidence by threat, enticement, or deceit or other unlawful methods."⁸¹ But despite such a provision, in existence before the 1997 amendments, China has often been cited in violation of the prohibition against torture and ill-treatment of detainees.⁸² Also, there is no explicit prohibition on the use of coerced confessions in evidence at trial.⁸³ Thus, although China can claim to comply with the prohibition against coerced confessions on the face of its laws, actual practice has proven, and may continue to prove, failed compliance.

Where police are able to impose administrative sanctions without trial, accused persons are prone to suffer undue delays. But setting aside for now the continued existence of re-education through labor, provisions in the new CPL seem to limit delays.⁸⁴ Before the amendments, police could previously detain suspects through shelter and investigation for up to three months (or longer with extensions).⁸⁵ The new law requires that police obtain an arrest warrant within three days, or else the suspect must be released.⁸⁶ The time to

⁷⁷ Donald C. Clarke, *One Step Back Permits Two Steps Forward*, CHINA RIGHTS FORUM (Fall 1996) (visited Nov. 8, 1997) <<http://www.igc.apc/hric/crg/english/96fall/35.html>>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Hungdah Chiu, *China's Criminal Justice System and the Trial of Pro-Democracy Dissidents*, 24 N.Y.U. J. INT'L L. & POL. 1181, 1190 (1992).

⁸¹ CPL, *supra* note 7 art. 43.

⁸² People's Republic of China, *Gross Human Rights Violations Continue*, *supra* note 60.

⁸³ CPL, *supra* note 7.

⁸⁴ *Commentary: Law Amendments for Better Checks and Balances*, *supra* note 66.

⁸⁵ Yu Ping, *supra* note 73.

⁸⁶ CPL, *supra* note 7 art. 69. See also *Commentary: Law Amendments for Better Checks and Balances*, *supra* note 66.

obtain a warrant may be extended to up to thirty days under special circumstances, such as for repeat offenders, roaming offenders, or gang crimes.⁸⁷ Whether or not these time limits are reasonable is subject to interpretation, but the changes do demonstrate marked improvements in the right to be free from undue delays.

2. *Rights During Trial*

China has also made great efforts to provide rights at trial. In a giant leap towards providing "equality of arms,"⁸⁸ the new CPL stipulates that, a judgment of guilty may only be rendered by the People's Court "when the facts of the case are clear, with verified and sufficient evidence . . . [and] according to law."⁸⁹ It also redefines "offender" as "criminal suspect" or "defendant,"⁹⁰ thus implicitly creating a presumption of innocence right.

The CPL also requires that, where evidence is insufficient for a finding of guilt, the judge should hold that "the criminal accusation is untenable"⁹¹ This indicates that the prosecution has the burden of proving guilt, rather than the defendant having the burden of proving innocence. Although the effectiveness of this change has yet to be proven, the amended CPL, on its face, does provide this element of the right to a fair trial.

Although Article 126 of China's 1982 Constitution declares judicial independence from "administrative organs, public organizations and individuals," it conveniently defines the Chinese Communist Party ("CCP") as neither an administrative organ nor public organization.⁹² Article 128 of the Chinese Constitution makes the courts accountable to the Standing Committee of the National People's Congress, and to various CCP authorities.⁹³

The CCP's influence over courts has fluctuated. There is evidence of a decrease in CCP influence following a 1980 speech by then President of the Supreme People's Court, Jiang Hua, in which he declared that the CCP was

⁸⁷ CPL, *supra* note 7 art. 69.

⁸⁸ See *supra* note 42 and accompanying text.

⁸⁹ CPL, *supra* note 7 arts. 12, 162. See also Lu Zhongya, *PRC: Newly Adopted "Presumption of Innocence" Principle*, SHANGHAI FAXUE, June 10, 1996, available in World News Connection, (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>>.

⁹⁰ CPL, *supra* note 7 art. 51. See also Yu Ping, *supra* note 73, at 5.

⁹¹ CPL, *supra* note 7 art. 46. See also Lu Zhongya, *supra* note 89.

⁹² ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] art. 126 (1982). See also CRIMINAL JUSTICE, *supra* note 72, at 52.

⁹³ ZHONGHUA RENMIN GONGHEGUO XIANFA [PEOPLE'S REPUBLIC OF CHINA CONSTITUTION] art. 128 (1982) [hereinafter PRC CONST.].

not to interfere in court decisions.⁹⁴ However, in early 1990, People's Supreme Court President Ren Jianxin reiterated the "importance of CCP leadership over the courts."⁹⁵ According to Lu Zhongya, the new CPL "increases the sense of confrontation in the court trial and emphasizes the role of the court in maintaining neutrality and upholding justice."⁹⁶

Despite this optimistic view, the pervasiveness of CCP power in all levels of Chinese society and culture cannot be denied.⁹⁷ Thus, the provision of fair trials calling for impartial and independent tribunals is still violated. The CPL, even prior to the 1997 amendments, required all trials to be held in public, except those involving state secrets.⁹⁸ The question is whether China's definition of "national security reasons" causes the provision to be violated. China places heavy emphasis on national security, as evidenced by its 1988 Law on State Secrets which "affords a ready basis for denying a public trial."⁹⁹ Also, the CCP's "Strike-Hard" anti-crime campaign¹⁰⁰ has specifically focused efforts on preventing "national separatist elements . . . [from] seriously endangering the public's lives and properties, as well as social stability and . . . modernization efforts . . ."¹⁰¹

Human rights organizations worldwide have blasted China for its treatment of dissidents, and its overly expansive definition of "state secrets."¹⁰² However, China's amendments to the Criminal Law reveal, in the least, attempts to remove overt politics from certain definitions.¹⁰³ The new Criminal Law redefines "counterrevolutionary crimes" (meant to encompass anything deemed a threat to China's leaders) as "crimes endangering the interests of National Defense."¹⁰⁴

The adequacy of defense counsel is greatly improved by the new laws. Article 34 of the revised CPL allows public defense counsel to be assigned to those who cannot otherwise afford representation.¹⁰⁵ However, public

⁹⁴ CRIMINAL JUSTICE, *supra* note 72, at 53.

⁹⁵ *Id.* at 54.

⁹⁶ Lu Zhongya, *supra* note 89.

⁹⁷ CRIMINAL JUSTICE, *supra* note 72, at 52.

⁹⁸ CPL, *supra* note 7 arts. 11, 152. See also U.S. DEP'T OF STATE, CHINA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 § 1(e) (1997).

⁹⁹ U.S. DEP'T OF STATE, *supra* note 98.

¹⁰⁰ See *infra* note 141 and accompanying text.

¹⁰¹ *Xinjiang Steps Up Anticrime Campaign*, URUMQI XINJIANG RIBAO, Apr. 29, 1996, available in World News Connection, (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>>.

¹⁰² CRIMINAL JUSTICE, *supra* note 72, at 48.

¹⁰³ Faison, *supra* note 64, at A1.

¹⁰⁴ CL, *supra* note 8 Ch. VII.

¹⁰⁵ CPL, *supra* note 7 art. 34. See also Yu Ping, *supra* note 73, at 5.

defense is not mandatory.¹⁰⁶ Under the new law, defendants are allowed to meet with counsel "starting the day when public prosecution has been initiated."¹⁰⁷ Previously, counsel was not allowed to review a client's case until seven days prior to trial.¹⁰⁸ The amended CPL reportedly increases lawyers' access to discovery materials, and broadens their time and ability to prepare a defense for their clients.¹⁰⁹

China is attempting to further professionalize the role of lawyers by granting more autonomy, and separating them from justice authorities.¹¹⁰ A new Lawyers' Law was passed in May 1995 acknowledging that a lawyer's role is to represent clients and not the state.¹¹¹ The law also formally granted permission for lawyers to establish private firms.¹¹² The Minister of Justice, Xiao Yang, announced in January 1996 that the Ministry would attempt to double the number of lawyers, notarial personnel, and grassroots legal service workers by the turn of the century, to help solve the structural impediments in the legal system.¹¹³

But the process is slow. Lawyers have long been discouraged from being "over-zealous" in defense of clients, and encouraged to argue for leniency rather than innocence.¹¹⁴ Because variation from this practice was, in the past, met with revocation of legal licenses by authorities, lawyers are still reluctant to provide adequate defense of criminal defendants.¹¹⁵ The principles necessary for adequate defense counsel are still not fully provided, but China is demonstrating a genuine desire to bring its legal system up to speed with the international standard.

3. *Rights After Trial*

Finally, the new CPL contains provisions intended to broaden rights after trial. Article 180 of the CPL provides the right to appeal for defendants and civil plaintiffs.¹¹⁶ China's court system is "based on the principle of 'four

¹⁰⁶ U.S. DEP'T OF STATE, *supra* note 98.

¹⁰⁷ CPL, *supra* note 7 art. 33. See also Yu Ping, *supra* note 73, at 5.

¹⁰⁸ *Law Amendments for Better Checks and Balances*, *supra* note 66.

¹⁰⁹ CPL, *supra* note 7 arts. 36, 37. See also Yu Ping, *supra* note 73, at 6.

¹¹⁰ CRIMINAL JUSTICE, *supra* note 72, at 41.

¹¹¹ Zhonghua Renmin Gongheguo Lushifa [The People's Republic of China's Lawyer's Law] (1996) translated in World News Connection, (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>> [hereinafter Lawyer's Law]. See also U.S. DEP'T OF STATE, *supra* note 98.

¹¹² Lawyer's Law, *supra* note 111 art. 2 See also U.S. DEP'T OF STATE, *supra* note 98.

¹¹³ U.S. DEP'T OF STATE, *supra* note 98.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ CPL, *supra* note 7 art. 180.

levels of courts and at most two trials to conclude a case' (one trial at first instance, one trial on appeal)." ¹¹⁷ So although the system does not offer multiple appeals, it does, strictly speaking, comply with the requirement that all persons "have the right to review of his or her sentence by a higher tribunal."¹¹⁸

Article 185 of the CPL gives local People's Procuratorates¹¹⁹ a similar right to appeal judgments of first instance.¹²⁰ The new CPL also provides that a victim and his or her lawyer can request the people's procuratorate to protest a judgment for the criminal defendant.¹²¹ Although the latter is touted as an improvement for victims' rights,¹²² both provisions create double jeopardy for the criminal defendant. After a determination of innocence by the court of first instance, the defendant can be subject to a second trial in which she or he can be found guilty. Further jeopardizing defendants, courts of appeals can remand cases to the court of first instance which is then authorized to impose a higher sentence than initially rendered.¹²³ Thus, although appellate courts are prohibited from issuing harsher sentences upon defendant appeals,¹²⁴ they are able to achieve such a result through remand to the trial courts.

Under the Administrative Litigation Law in China, detainees may challenge re-education-through-labor decisions.¹²⁵ The process is reportedly a difficult one, and almost always rejected by courts.¹²⁶ However, a July 24, 1996 newspaper article reported a lawsuit filed by prominent dissident Liu Nianchun against Beijing authorities for unjust detention.¹²⁷ This demonstrates some provision for the right to obtain a remedy for the infringement of freedom, although reality may prove different.

¹¹⁷ CHEN, *supra* note 74, at 107.

¹¹⁸ *Draft Body of Principles*, *supra* note 3, at 78.

¹¹⁹ See *supra* note 74 and accompanying text.

¹²⁰ CPL, *supra* note 7 arts. 181, 185.

¹²¹ *Id.* art. 182.

¹²² Yu Ping, *supra* note 73.

¹²³ CRIMINAL JUSTICE, *supra* note 72, at 62.

¹²⁴ CHEN, *supra* note 74, at 160.

¹²⁵ Zhonghua Renmin Gongheguo Xingzheng Susungfa [The People's Republic of China's Administrative Litigation Law] (1990) [hereinafter Administrative Litigation Law]. See also *Human Rights in China*, Mar. 23, 1996 (visited Nov. 8, 1997) <gopher.igc.apc.org:5000/00/nat/hric>.

¹²⁶ *Human Rights in China*, *supra* note 125.

¹²⁷ *Dissident Sues Beijing Over Imprisonment*, VANCOUVER SUN, July 24, 1996, available in 1996 WL 5015486.

IV. THE FUTURE

A. *Obstacles and Doubt: Compliance May Be Far Away*

The gaps and vagueness which continue to plague the new CPL¹²⁸ demonstrate the current lack of compliance. Many skeptics argue that the changes in the CPL and CL will never really be carried out in practice.¹²⁹ Indeed there is reason to doubt that China will fully embrace the right to a fair trial. Essentially this right protects individual rights over the interests of the collective, a concept foreign to China.¹³⁰ Also, China has historically de-emphasized written law and the role of the judiciary.¹³¹ As a result, China's legal infrastructure is unable to accommodate fair trials, regardless of lawmakers' intentions to promote defendants' rights.¹³²

¹²⁸ *Human Rights in China*, *supra* note 125.

¹²⁹ Faison, *supra* note 64, at A1; Yu Ping, *supra* note 73.

¹³⁰ A system of government that embraces the right to a fair trial necessarily embraces individual rights. This is because criminal defendants are at the mercy of the legal system in which they are facing trial, and the purpose of criminal justice systems is to maintain and protect society. In *SUMMA THEOLOGIAE* Ia2ae90.4, St. Thomas Aquinas stated that "law is nought else than an ordinance of reason for the common good made by the authority who has care of the community." R.A. DUFF, *TRIALS AND PUNISHMENTS* 74 (1986). To achieve the purpose of maintaining and protecting society, those found guilty at trial are punished. In defining the retributivists' justification for punishment, R.A. Duff states that "punishment is a just and proper response to a past offence, since it restores that fair balance of benefits and burdens in society which crime disturbs . . ." *Id.* at 205.

A "fair" trial seems to imply, therefore, that the innocent will be found innocent. But the right to a fair trial is not necessarily the right to a fair result. It is only a right to rules and procedures that protect the right to a fair result. R.A. Duff cites Rawls and explains that "we cannot design procedures which will guarantee the right outcome in every case: trials are not instances of 'perfect procedural justice,' and will sometimes produce the wrong result; the best we can do is design procedures which will be reasonably, though not ideally, efficient." J. RAWLS, *A THEORY OF JUSTICE* 110. In other words, by imposing certain rules and procedures for the protection of the defendant, a criminal justice system can determine the truth as best as possible.

As individual states develop rules and procedures for trials in their criminal justice systems, other factors will enter into the equation, such as the need to fight crime effectively, prison overcrowding, or a legal infrastructure lacking sufficient numbers of attorneys, judges, etc. that limit the protections for defendants. However, the state, which is responsible for protecting its citizens, has an incentive to maintain a high rate of conviction, even at the risk of punishing some innocent individuals. In 1983, the Standing Committee of the National People's Congress in China stated: "In order to maintain public security, ensure the safety of the lives and property of the people and safeguard the smooth progress of the socialist construction, it is imperative to subject criminals who seriously endanger public security to severe punishment." *Standing Committee of People's Congress, Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security*, Sept. 2, 1983, available in LEXIS, Intlaw Library, Chinal File. Thus, the right to a fair trial is needed to ensure that criminal defendants' rights are not compromised as the state attempts to meet the goals of its criminal justice system. See *supra* note 42, on "equality of arms."

¹³¹ See *supra* note 6 and accompanying text.

¹³² See *supra* Section III(B)(2), *supra* note 113 and accompanying text.

1. *The Collective Over the Individual*

The right to a fair trial protects individual defendant rights.¹³³ In order for China to embrace individual rights, China must revise four thousand years of Confucianist and socialist values.¹³⁴ Following Confucian and socialist tenets, China has historically placed the state first, the collective second, and the individual last.¹³⁵ "The Mandate of Heaven," a principle tenet of Confucianism somewhat similar to the concept of natural law in Western nations, limited governmental power and prescribed rulers to be concerned with the welfare of its citizens.¹³⁶ However, Chinese humanism and the Mandate of Heaven were rejected and denounced as "bourgeois" and "counterrevolutionary" in 1949 when the People's Republic of China was established.¹³⁷ The elimination of the Mandate of Heaven allowed the state to focus on the needs of the collective without limitations concerning the welfare of individuals.

This hierarchy is apparent in China's written law. Article 51 of the 1982 Chinese Constitution provides that the rights and freedoms of the people "may not infringe upon the interests of the state, of society and of the collective"¹³⁸ Because fighting crime is intended to protect society, it is an interest of the collective.¹³⁹ China's dramatic increases in crime have made crime-fighting a focus of concern, thus emphasizing the collective and de-emphasizing the individual.¹⁴⁰

¹³³ See *supra* note 130.

¹³⁴ Dean G. Rojek, *A Brief History of China*, in SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA 14 (Ronald J. Troyer et al. eds., 1989).

¹³⁵ Margaret Ng, *quoting* Professor Gong Xiangrui, *Are Rights Culture-Bound?* in HUMAN RIGHTS AND CHINESE VALUES 59, 64 (Michael C. Davis ed., 1995); Christensen, *supra* note 28. It will be difficult for China to ignore such a long history of cultural influences. Zhengyuan Fu, *China's Perception of the Taiwan Issue*, 1 UCLA J. INT'L L. & FOREIGN AFF. 321, 322-3, (1996-97).

¹³⁶ John F. Copper, *Defining Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 9 (Yuan-li Wu et al. eds., 1988).

¹³⁷ *Id.* at 10.

¹³⁸ ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (1982). See also Christensen, *supra* note 27, at 475.

¹³⁹ See *supra* note 130.

¹⁴⁰ Jumps in China's crime rates between 1993 and 1994 for violent crimes, fraud, and theft were 15.6%, 26.3%, and 17.7% respectively. Anthony Davis, *A Gold Rush to Mayhem, Organized Crime*, WORLD PRESS REV., Mar. 1996, available in 1996 WL 8399585. During that same period in Shenzhen, the economic sector near Hong Kong, overall crime rose an alarming 66%, with convictions for prostitution, gambling, and drug abuse rising at 92%. *Id.* Of particular state concern is the increase in organized crime, as a result of the newly thriving drug and weapons trade. *Id.* News reports highlight the rise in economic crimes accompanying the opening of trade doors. Ren Jianxin *Details Importance of "Strike-Hard" Struggle*, BEIJING LIAOWANG, Jan. 6, 1997, available in World News Connection, (visited Nov. 8, 1997) <<http://wnc.fedworld.gov>>.

China has responded to the current elevated levels of crime with its "Strike-Hard" campaign against crime.¹⁴¹ A Supreme People's Procuratorate work report from March 1996 stresses the need to crack down on corruption, bribery, and other crimes by officials.¹⁴² This campaign illustrates how China's intentions are still focused on the collective.¹⁴³ As the market opens wider and crime continues to rise, the Communist Party is encouraged to focus increasingly on the collective, particularly regarding the right to a fair trial. Undoubtedly, improving the rights of criminal defendants would work contrary to the efforts of the Chinese Communist Party's "Strike Hard" against crime campaign. Moreover, in the face of the high rates of crime, the people of China support the state's Strike Hard campaign. Thus, even as the recent amendments seemingly attempt to provide individual rights before, during, and after trial, skeptics predict that Chinese officials will continue to prioritize the collective over the individual in practice.

2. *De-emphasis of Written Law and the Judiciary*

Another obstacle to the right to a fair trial is the historical de-emphasis of written law and the judiciary in China.¹⁴⁴ This de-emphasis weakens any attempt to provide criminal defendants with due process rights. In traditional China, formal codes were thought to obscure the moral principles behind them.¹⁴⁵ Thus, leaders ruled "through moral example," and viewed written laws with suspicion.¹⁴⁶ Although formal laws and procedures are gaining acceptance, as evidenced by the recent amendments, it may take some time before they are accepted in practice.

The court system in China, established in 1979, has struggled to gain legitimacy.¹⁴⁷ China lacks the strong jurisprudential tradition indicative of

¹⁴¹ Antoaneta Bezlova, "Strike Hard" Sees 1,000 Executions in Three Months, Inter Press Service, Aug. 5, 1996, available in Chinalaw Computer Assisted Legal Research Center; *Cynicism Greets Anti-Crime Fanfare*, S. CHINA MORN. POST, May 5, 1996, available in 1996 WL 3757263; *China Executes Another Six in Its Anti-Crime "Strike Hard" Campaign*, Agence France Presse, Aug. 5, 1996, available in 1996 WL 3901255.

¹⁴² *Supreme People's Procuratorate Work Report, 20 March 96*, BBC SUMMARY OF WORLD BROADCASTS, Apr. 4, 1996, available in LEXIS, News Library, Arcnews File (translating Xinhua News Agency, Mar. 20, 1996).

¹⁴³ See *supra* note 135 and accompanying text.

¹⁴⁴ This involves a general de-emphasis of law, as well as of the role of courts in China. Troyer, *supra* note 6.

¹⁴⁵ *Id.* at 51-52.

¹⁴⁶ *Id.* at 52.

¹⁴⁷ CHEN, *supra* note 74, at 115.

Western legal systems.¹⁴⁸ Under Articles 62 and 67 of the Chinese Constitution, the National People's Congress ("NPC") and NPC Standing Committee, not the courts, are responsible for interpreting the law.¹⁴⁹ There is no system of judicial review for legislative and administrative actions pursuant to such interpretation.¹⁵⁰ Under the provision requiring independent and impartial tribunals, the courts are answerable to the Communist Party, and thus lack legitimacy as fully autonomous entities.¹⁵¹ In addition, China's legal infrastructure is greatly lacking, adding to the weakness of the judiciary.¹⁵²

There is some evidence that legal precedent is playing an increasingly important role in China.¹⁵³ However, optimism must come with a healthy dose of patience. The Communist Party still heavily influences court decisions and opinions.¹⁵⁴ Legal precedent in China, though important, does not ensure fair trials.¹⁵⁵ Rather than reflecting the law as established by an independent, impartial judiciary, legal precedent in China offers a barometer for Communist Party sentiment.¹⁵⁶

B. *Why There is Hope*

Despite the skepticism of commentators and the obstacles to compliance with the right to a fair trial, the amendments to the CPL and CP, are at least a step in the right direction. The past fifty years in China have held so much revolutionary change that the future is very difficult to predict.¹⁵⁷ Nonetheless, one should not dismiss the possibility of eventual

¹⁴⁸ Harvard Law Rev. Ass'n, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1893 (1985).

¹⁴⁹ ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] arts. 62, 67 (1982). See also Michael Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES 3, 9-10 (Michael C. Davis ed. 1995).

¹⁵⁰ Davis, *supra* note 149 at 9.

¹⁵¹ CHEN, *supra* note 74, at 119.

¹⁵² U.S. DEP'T OF STATE, *supra* note 98 and accompanying text.

¹⁵³ Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107, 108 (1991).

¹⁵⁴ CHEN, *supra* note 74, at 119.

¹⁵⁵ Cases published in the Gazette are often used to make an example of criminals convicted of particularly odious crimes to demonstrate the severity of their punishment which is often capital. Nanping Liu, *supra* note 153, at 123.

¹⁵⁶ *Id.* at 116.

¹⁵⁷ Dean of UC Berkeley's Graduate School of Journalism and China observer, Orville Schell, talking about China in his review of Willem van Kemenade's book CHINA, HONG KONG, TAIWAN, INC., stated, "Indeed, rarely has there been a country of consequence that has so defied prediction Needless to say, no self-respecting 'China expert' now wants to predict stability only to be embarrassed by

compliance. Despite Chinese leaders' adamant rejection of "Western-style" democracy,¹⁵⁸ elements of democracy are taking root via large economic¹⁵⁹ and gradual political reforms.¹⁶⁰ As the world becomes increasingly interconnected through technological development and economic globalization, political and social influences will also affect each nation's development.¹⁶¹ This gradual mingling of globalization forces promises positive effects for compliance with human rights standards such as the right to a fair trial.

1. *A Brief History Reveals Unpredictability for China's Future*

The past half century in China has been full of change and surprise, making the future almost impossible to predict.¹⁶² In 1921, the Chinese Communist Party was formed.¹⁶³ After a struggle between communist forces led by Mao Tse Tung and nationalist forces led by Chiang Kaishek, the communists prevailed.¹⁶⁴ On October 1, 1949, Mao established the People's Republic of China.¹⁶⁵ After unsuccessful attempts at modernization which brought dramatic drops in production and mass starvation,¹⁶⁶ Mao initiated the Cultural Revolution in 1966.¹⁶⁷ The Cultural Revolution saw the closing of schools, vicious attacks on anything connected to the "capitalist West,"¹⁶⁸ the rejection of the Mandate of Heaven,¹⁶⁹ and the destruction of art, books,

another eruption like [Tiananmen Square], or to be on record as forecasting disintegration only to have China cruise into the next millennium as the newest superpower." Schell, *supra* note 15.

¹⁵⁸ Jiang Calls For New Direction in China's Political System, Agence France-Presse, Sept. 12, 1997, available in 1997 WL 13393200.

¹⁵⁹ John Leicester, *Communist Leader Directs China Down Capitalist Road*, Associated Press Political Service, Sept. 12, 1997, available in 1997 WL 2548935.

¹⁶⁰ Jiang Calls For New Direction in China's Political System, *supra* note 158.

¹⁶¹ Frederick M. Abbott, *International Trade and Social Welfare: The New Agenda*, Transcript of January 7, 1995 Meeting of the Section on International Law of the American Association of Law Schools, 17 COMP. LAB. L.J. 338, 346, (1996).

¹⁶² For a brief history of China, see Rojek *supra* note 134; CHEN, *supra* note 74, Ch. 1, 2.

¹⁶³ Rojek, *supra* note 134, at 14.

¹⁶⁴ *Id.* at 15.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ CHEN, *supra* note 74, at 29.

¹⁶⁸ Rojek, *supra* note 134, at 15.

¹⁶⁹ See *supra* note 135 and accompanying text. See also John F. Cooper, *Defining Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA, 10 (Yuan-li Wu et al. eds., 1988).

and anything perceived to be feudalistic or bourgeois.¹⁷⁰ In 1976, the Cultural Revolution ended with Mao's death.¹⁷¹

Deng Xiaoping, himself a victim of the Cultural Revolution, rose as China's new leader.¹⁷² Like Mao, Deng sought modernization, but through an "Open Door" policy with the West that brought technological development, increases in productivity, and the re-establishment of China's criminal justice system, rejected during the Cultural Revolution.¹⁷³ Deng's economic reform also dramatically raised the standard of living in China's urban areas for those who had endured poverty and tremendous suffering during the Cultural Revolution.¹⁷⁴

In June 1989, the world was stunned when a peaceful pro-democracy student demonstration was violently suppressed and several hundred were killed at Tiananmen Square.¹⁷⁵ In January 1997, China's new CPL took effect.¹⁷⁶ Deng Xiaoping died February 20, 1997, adding significantly to the atmosphere of uncertainty in China.¹⁷⁷ Also, on July 1, 1997, Hong Kong reverted back to China after a century and a half of British rule.¹⁷⁸ These recent, significant events, combined with China's history of change, make predictions for China's future uncertain at best.

2. Democratization

As discussed in Section III of this Comment, skepticism about the prospect of legal reform followed the CPL and CL amendments which took effect in January and March of 1997.¹⁷⁹ But following Deng's death and Hong Kong's reversion, political reform has been much talked about and even anticipated.¹⁸⁰ On the opening day of the fifteenth quintannual People's Congress of China's Communist Party, which convened September 12, 1997,

¹⁷⁰ CHEN, *supra* note 74, at 30.

¹⁷¹ Rojek, *supra* note 134, at 15.

¹⁷² *Id.*

¹⁷³ *Id.* at 15-16.

¹⁷⁴ Xiao-huang Yin, *China's Gilded Age*, THE ATLANTIC MONTHLY, Apr. 1, 1994, at 42, available in 1994 WL 13092183.

¹⁷⁵ ALFRED K. HO, JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA: CAN CAPITALISM AND COMMUNISM COEXIST? Ch. 5; *China: Tiananmen—The Silencing of Remembrance*, Amnesty International, June 2, 1997 <<http://www.amnesty.org>> AI Index: ASA 17/28/97.

¹⁷⁶ CPL, *supra* note 7. See also Yu Ping, *supra* note 73.

¹⁷⁷ Edward A. Gargan, *China After Deng: The Neighbors*, N.Y. TIMES, Feb. 20, 1997, at A11.

¹⁷⁸ David E. Sanger, *New Leader of Hong Kong Disputes U.S. on Rights*, N.Y. TIMES, Sept. 10, 1997, at A8.

¹⁷⁹ See *supra* Section III.

¹⁸⁰ Schell, *supra* note 15.

President Jiang Zemin announced, albeit guardedly, that China would introduce political reform along with bold economic changes.¹⁸¹ Also, Jiang stated that political reform "must go hand-in-hand with the efforts to improve the legal system so [China] is ruled by law."¹⁸² However, Jiang stressed that Western-style democracy would not be allowed to compromise the power of the Chinese Communist Party.¹⁸³ Still, the bold moves carefully described as "enterprise reform,"¹⁸⁴ or a form of "public ownership,"¹⁸⁵ rather than "privatization," indicate a broad step toward Western-style capitalism indicative of democratic, not communist regimes.

Following the massacre at Tiananmen Square in 1989, hopes for democracy in China's future were bleak.¹⁸⁶ One might have predicted that dissident forces would increase and eventually overthrow the oppressive communist regime. Indeed, after Deng's death in February 1997, the Communist Party was prepared for student protest.¹⁸⁷ However, the events of June 1989 did not repeat.¹⁸⁸ And the hints at political reform suggest that the Chinese government is inching ever closer toward a political system which it denies it will ever adopt, and which less than a decade ago, it so violently opposed at Tiananmen Square.

Liu Ji, a top adviser to Jiang Zemin and vice president of China's premiere think tank, the Chinese Academy of Social Sciences, declared in an interview with the China news service that political reform would be necessary for the development of China's economy.¹⁸⁹ Untroubled by memories of Tiananmen's 1989 student demonstrations, Liu stated, "When the people have enough food to eat and enough clothes to keep warm and as

¹⁸¹ China's leaders announced plans to sell over 10,000 of China's 13,000 large and mid-sized state-run enterprises. Seth Faison, *Major Shift for Communist China: Big State Industries Will Be Sold*, N.Y. TIMES, Sept. 12, 1997, at A1 [hereinafter *Major Shift*]; Jasper Becker, *PLA to be Cut by 500,000 as Jiang Seeks Leaner Force*, S. CHINA MORN. POST, Sept. 13, 1997, available in 1997 WL 13263635; Steven Mufson, *China to Cut Number of State Firms*, WASH. POST FOREIGN SERVICE, Sept. 15, 1997, at A20.

¹⁸² *Jiang Calls for New Direction in China's Political System*, *supra* note 158.

¹⁸³ Leicester, *supra* note 159; *Jiang Calls for New Direction in China's Political System*, *supra* note 158.

¹⁸⁴ Daniel Kwan, *Enterprise Reform, Not Privatization*, S. CHINA MORN. POST, Sept. 12, 1997, available in 1997 WL 13263499.

¹⁸⁵ *Major Shift*, *supra* note 181.

¹⁸⁶ See *supra* note 175 and accompanying text.

¹⁸⁷ Seth Faison, *China After Deng: Students*, N.Y. TIMES, Feb. 24, 1997 at A8 [hereinafter *China After Deng: Students*].

¹⁸⁸ University security forces at Beijing University were on 24-hour alert, but one student described the climate as "very quiet," stating, "There's no atmosphere for rebellion." *Id.*

¹⁸⁹ Catherine Sampson, *Beijing Think-Tank Calls for Forbidden Freedoms*, THE GUARDIAN (LONDON), Sept. 3, 1997, at 11, available in LEXIS, News Library, Txtnws File.

cultural standards increase, they will want to express their opinions.”¹⁹⁰ According to Liu, participation in political thinking by the people is “a sign of the prosperity and strength of the nation and is also a tide of the age that cannot be turned back.”¹⁹¹ Liu then stated that the fifteenth Communist Party Congress must satisfy the demands of the people by joining economic breakthroughs with reforms of the political system.¹⁹²

Hopeful for democracy, but acknowledging critiques that China’s political reform is too slow, a reporter for Agence France-Presse wrote that “President Jiang Zemin’s opening address Friday to the 15th Chinese Communist Party Congress was welcomed by observers [in Hong Kong] as a sign the mainland is moving forward on the path to democracy and a market economy.”¹⁹³ Also, Jiang indicated that China would allow residents in urban areas to vote directly for their leaders.¹⁹⁴ Currently, people in rural areas across China elect their village leaders, but the proposal for urban elections, to take effect as early as next year, would greatly expand democracy at the grassroots level.¹⁹⁵

Democracy is not, by definition, an essential step for compliance with the right to a fair trial.¹⁹⁶ But if democracy were to take root in China, one could easily envision the path to compliance.¹⁹⁷ The question is whether China’s bold economic reforms and veiled political reforms signify a movement towards a system of government with enough elements of a democracy to enforce the right to a fair trial. Many reports and analyses

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Kieron Flynn, *HK Welcomes Tone of Jiang’s Speech, But Says Change Too Slow*, Agence France-Presse, Sept. 12, 1997, available in 1997 WL 13393251.

¹⁹⁴ Kathy Chen, *China Plans to Expand Direct Elections to Townships as Early as Next Year*, WALL ST. J., Sept. 15, 1997, available in 1997 WL-WSJ 14166209.

¹⁹⁵ *Id.* This allows the people to choose who in the Communist Party will lead them, but the elections do not signify the beginning of a multi-party system. See CHEN, *supra* note 74, at 63.

¹⁹⁶ Although China’s system is not a multi-party system, the Chinese Communist Party could hypothetically rule China and enforce the elements of the right to a fair trial. See CHEN, *supra* note 74, at 63.

¹⁹⁷ Some democratic countries may have shortcomings in complying with the fair trial right, as defined in more detail by the U.N. Sub-Commission’s Draft Body of Principles. See *supra* Section II (B). For example, it could be argued that the continued existence of racism, sexism, classism, and homophobia result in unfair trials in the United States. But these shortcomings are minor in comparison to those currently preventing compliance with the right in China. Given the simplified, basic definition of the right to a fair trial as set forth in Section II of this comment, the principles of government recognized in currently existing democracies will be considered to comply.

imply that China will not embrace democracy.¹⁹⁸ However, many believe that the current process of economic globalization will lead inevitably to democracy.¹⁹⁹

3. Globalization

Free market advocates theorize that the continued opening of trade doors will improve the welfare of the world.²⁰⁰ Since the opening of its trade doors with the West, China's economy has grown exponentially.²⁰¹ China has succeeded in making itself a leading trading partner²⁰² and economic force in the global community.²⁰³ As China's economy has developed, China has become interconnected to²⁰⁴ and interdependent with²⁰⁵ the global community.²⁰⁶ In turn, the world has come to rely on China's role in the global economy.²⁰⁷

¹⁹⁸ *China: Amnesty International Meets with Chinese Officials*, *supra* note 1; Yu Ping, *supra* note 73; Dele Olojede, *Political Reform for China?* *NEWSDAY*, Sept. 14, 1997, available in 1997 WL 2709571.

¹⁹⁹ Clinton linked free trade with the growth of democracy in a speech outlining his presidential agenda. James Bennett, *Students Hear Clinton Tell of Priorities for the Fall*, *N.Y. TIMES*, Sept. 10, 1997, at A20.

²⁰⁰ In his opening remarks to the January 7, 1995 meeting of the Section on International Law of the American Association of Law Schools, law professor Frederick M. Abbott stated that "social welfare reform cannot possibly be undertaken without economic growth." Abbott, *supra* note 161, at 346. Susumu Yabuki commented in his book *CHINA'S NEW POLITICAL ECONOMY*, "Only by taking the slightly circuitous route to democracy via economic development can the problem of the human rights of the Chinese people truly be resolved." SUSUMU YABUKI, *CHINA'S NEW POLITICAL ECONOMY: THE GIANT AWAKES* 227 (Stephen M. Harner, trans. 1995).

²⁰¹ Ho, *supra* note 175, at 37-67; Xiao-huang Yin, *China's Gilded Age*, *ATLANTIC MONTHLY*, Apr. 1, 1994, available in 1994 WL 13092183.

²⁰² Ho, *supra* note 175, at 65.

²⁰³ Lorien Holland, *China Ups its Superpower Image with India and Pakistan Trip*, *Agence France-Presse*, Nov. 26, 1996, available in 1996 WL 12188643; Monica Hsiao, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 *UCLA PAC. BASIN L.J.* 431, 451, Spring 1994; Janiece Marshall, *Current Developments in the People's Republic of China: Has China Changed?* 1 *TRANSNAT'L L.* 505 (1989).

²⁰⁴ As technology develops and the world globalizes, people from all corners of the international community are increasingly aware of what is happening, economically, politically and socially, in other nations. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 *CORNELL INT'L L.J.* 429, 455-56 (1997).

²⁰⁵ Ho, *supra* note 175, at 37-67.

²⁰⁶ Some disagree that globalization is beneficial, particularly regarding its effects on the environment. *Incorporating the World*, *THE NATION*, July 15, 1996, available in 1996 WL 9220532.

²⁰⁷ Ho, *supra* note 175, at 65.

Although the international political community advocates enforcement of human rights standards,²⁰⁸ no state wants to rock the economic community's boat.²⁰⁹ China is in a politically unstable condition,²¹⁰ given Deng's recent death and the July turnover of Hong Kong.²¹¹ Interdependence and fear of disrupting current economic success has kept the world from taking action as a global community to enforce human rights in China,²¹² such as the right to a fair trial. Accordingly, the United States' practice of threatening to withdraw China's Most Favored Nation ("MFN") status to pressure conformity with international human rights standards has been widely criticized.²¹³

Whether the argument is due to economic dependence on the part of nations economically intertwined with China, or due to concern for China's successful political development, the world is, for the most part, encouraging political stability in China and treading softly on pressures to reform. Chinese President Jiang Zemin stated that China would undertake political reform towards the development of a socialist democracy, but that maintaining stability is critical.²¹⁴ Even people inside China have reason to advocate slow change.

China's booming economy has improved the lives of many within China who seem content to enjoy the benefits of growth as they patiently wait for political change.²¹⁵ Despite the still active and influential²¹⁶ dissident

²⁰⁸ Jonathan Hecht, *China: Time for a New Approach on Human Rights*, Lawyers Committee for Human Rights, ADVISOR Spring 1997, (visited Nov. 8, 1997) <<http://www.lchr.org/sadvisor/sadvisor.htm>>.

²⁰⁹ YABUKI, *supra* note 200, at 227.

²¹⁰ Sheryl WuDunn, *China After Deng: The Economy*, N.Y. TIMES, Feb. 21, 1997, at A15.

²¹¹ Edward A. Gargan, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A1.

²¹² In his book CHINA'S NEW POLITICAL ECONOMY, Susumu Yabuki states, "Political stability is essential for economic development . . . [and] if there is no underpinning of economic development, it is futile to attempt frontally to ameliorate human rights in China." YABUKI, *supra* note 200, at 227.

²¹³ See generally The National Bureau of Asian Research, *Promoting U.S. Interests in China: Alternatives to the Annual MFN Review*, ANALYSIS, July 1997; See also, *Import Policy: Clinton Meets Chinese Officials Expresses Human Rights Concerns*, INT'L TRADE REPORTER, Asia/Pac. Rim, May 4, 1994, available in 11 ITR 18 d32; Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM J. INT'L L. 719, 744 (1994). President Clinton explained that by maintaining a relationship with China as a trade partner, the United States could better bring about desired change. *Id.* at 745.

²¹⁴ Jasper Becker, *Caution Key to Reform of Government*, S. CHINA MORN. POST, Sept. 13, 1997, available in 1997 WL 13263711; Steven Mufson, *Jiang Opens Communist Congress with Calls for Change, Stability*, WASH. POST, Sept. 13, 1997, A19.

²¹⁵ Xiao-huang Yin, *supra* 174.

community,²¹⁷ reports indicate that the majority of Chinese are more concerned today with economics than politics.²¹⁸ The past few decades in China prior to Deng's introduction of capitalism were characterized by great suffering.²¹⁹ In contrast, Chinese today are enjoying relative prosperity and the opportunity to become wealthy.²²⁰ The improvements brought with economic growth make the wait for compliance with international human rights standards more tolerable, no matter how long it will be.

Given the approval from outside and inside China of Deng's plan for economic and political development, the development of democratic principles in China is a distinct possibility, though Chinese leaders may never acknowledge it as such. However, the transition will not go without difficulty. As China privatizes, the country so used to looking after the collective will experience layoffs, widening income gaps, and other economic hardships.²²¹ Despite dismissal of potential social unrest by Chinese leaders,²²² the threat of economic protest from those adversely affected is a very real concern.²²³ The leadership of the Communist Party will be a critical force guiding China through its planned development.²²⁴

4. *Hope*

It appears that the world is willing to support and encourage China's economic development, with the hope that economic globalization will have positive after-effects for human rights.²²⁵ Although this path to compliance with the fair trial right is long and uncertain, one cannot rule out the possibility that China will eventually comply. Given the recent significant

²¹⁶ Stating that "student movements have been at the crest of political change in China," reporter Seth Faison for the New York Times describes student activity in China as a barometer for transitions. *China After Deng: Students*, *supra* note 187.

²¹⁷ *Dissident Sues Beijing Over Imprisonment*, *supra* note 127; *China: Political Trials Result in Heavy Sentences on Dissenters*, Amnesty International, Jan. 8 1997 <<http://www.amnesty.org>> AI Index: ASA 17/01/97.

²¹⁸ Marshall, *supra* note 203; Xiao-huang Yin, *supra* note 174; YABUKI, *supra* note 200, at 227.

²¹⁹ See *supra* Section IV(A)(1), notes 165 to 169 and accompanying text.

²²⁰ See *supra* notes 218 and accompanying text.

²²¹ Seth Faison, *For China's Leaders at Congress, the Plaudits Cascade Down*, N.Y. TIMES, Sept. 14, 1997, at 15; Steven Mufson, *The Chinese Communist Party: Graft, Growth, Discord Trouble Aging Coalition*, WASH. POST Sept. 13, 1997, at A22.

²²² *Employment Issue Not to Cause Social Unrest: Labor Minister*, Xinhua News Agency, Sept. 14, 1997, available in LEXIS, News Library, Txtwns File.

²²³ Sheryl WuDunn, *supra* note 210.

²²⁴ Gargan, *supra* note 177.

²²⁵ Jonathan Hecht prescribes a more proactive approach to enforcing the right to a fair trial in his article for the Lawyers Committee for Human Rights. *OPENING TO REFORM*, *supra* note 1.

and positive reforms in China, future compliance is likely. With patience, there is hope that the right to a fair trial in China will one day be realized.

V. CONCLUSION

As evidenced by the U.N. Sub-Commission study and the Draft Body of Principles, the right to a fair trial is gaining acceptance as an international human rights standard. China currently fails to comply with the elements of the right, although recent amendments to China's CPL and CL improve defendant rights before, during, and after trial. Citing China's history of human rights violations, doubters argue that true legal reform is distant, if at all realizable. But despite significant obstacles to compliance with the fair trial right, China's current economic and political reforms are moving towards providing the right. Reports that China will gradually accept political reforms as part of its development process combined with encouragement from the international community via economic globalization provide hope that compliance will eventually be realized.